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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-3391

BERNARD CORNFELD, d/b/a GRAYHALL, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The petitioner, Bernard Cornfeld, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 31, 1977.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, appears in the Appendix hereto. The opinion sustained the conviction of petitioner in the District Court where after a jury trial he was found guilty on each of three counts of wire fraud in violation of 18 U.S.C. §1343.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 31, 1977, and this petition was filed within thirty (30) days of that date.* This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether information obtained through a telephone wiretap undertaken without a warrant by a private wire carrier may be introduced by the government as evidence in the prosecution of petitioner for violation of 18 U.S.C. §1343.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:
§1343.

"Whoever, having devised or intending to devise any scheme or

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* See Appendix B.

artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523."

United States Code, Title 47:
§605.

"Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee,

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his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority."

United States Code, Title 18:
§2511(2)(a).

"It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or for the protection of the rights or property of the carrier of such communication: Provided, That said communication common carrier shall not utilize service observing or random monitoring except

for mechanical or service quality control checks."

STATEMENT OF THE CASE

On August 10, 1976, following a jury trial, petitioner was found guilty of each of three counts of wire fraud and on September 30, 1976, was sentenced to serve concurrent sentences of ninety (90) days on each of the counts, to pay restitution to the telephone company, and to pay a total fine of $3,000.00. The indictment alleged that Cornfeld caused his employees to place overseas calls via "blue boxes", thereby bypassing Pacific's billing apparatus, in violation of 18 U.S.C. §1343.

The evidence against Cornfeld consisted primarily of the testimony of former secretaries and evidence obtained by the telephone company's warrantless wiretap. The Pacific Telephone Company first became suspicious of blue box activity at Grayhall (petitioner's corporation) when an 800 INWATS printout revealed that phone calls from Grayhall to 800 numbers (toll free) significantly exceeded the average talking times to toll free numbers. Thereafter a company agent attached a CMC 2600 to Grayhall's lines; this device detected the presence of a 2600 cycle tone, which tone is utilized by the phone company in opening up long distance circuits. Moreover, the 2600 cycle tone does not ordinarily originate at the subscribers location, and

therefore its detection at the subscriber's location is indicative of blue box use. The agent concluded, after obtaining the foregoing information, that blue box activity was in fact occurring at Grayhall.

Nonetheless, the agent attached an Hekemian 51A, a sophisticated pen register, to Grayhall's telephone lines. This device printed on a paper tape in black the telephone numbers dialed without the aid of a blue box and printed in red all calls preceded by a 2600 cycle tone, i.e., blue box calls. In addition to this apparatus, the agent ultimately attached a tape recorder activated by the 2600 cycle tone, which operated for approximately 2 minutes and revealed the telephone numbers dialed and the beginning of the communication. The telephone company contended it only recorded three calls in a 12 day period. It is noteworthy that the telephone company had concluded blue box activity was taking taking place at Grayhall prior to the attachment of either the Hekemian 51A or the tape recorder.

On January 22, 1975, Pacific informed the F.B.I. of the investigation. On January 28, F.B.I. Special Agent Willie White participated in the execution of a search warrant at Grayhall. The agents recovered two blue boxes, a group of cards containing numbers frequently called via the blue box, and directions for using a blue box, all in a third floor, locked bedroom.

On the basis of the material produced by Pacific and the evidence obtained in the search of Grayhall, petitioner was charged with three counts of fraud by wire and causing an offense, under 18 U.S.C. §§1343 and 2. Petitioner moved under Rule 41(f), Fed.R.Crim.Proc., to suppress all of the evidence resulting from the telephone company's investigation and from the F.B.I. search. Following a hearing, the motion to suppress was denied. The matter was tried to a jury on August 3, 1976, resulting in findings of guilty on all counts on August 10, 1976.

REASONS FOR GRANTING THE WRIT

Because 18 U.S.C. §2511 permits conduct - wiretapping - that is particularly repugnant to established traditions of liberty and privacy, it is especially important that this Court clarify and standardize the rules under which such activity may take place, as well as the use to which such wiretaps may be put by government prosecutors.

This Court Should Reconcile Conflicting Rules Regarding Permissible Wiretapping Under 18 U.S.C. §2511(2)

The testimony of prosecution witnesses in the case at bar demonstrates that there was evidence of "blue box" activity at

Grayhall, Inc., prior to Pacific Telephone's tapping of petitioner's phone. The question then arises, in light of other checking devices employed by Pacific, whether the wiretap was a "necessary incident to the rendition of his service or to the protection of the rights or property of the carrier." It is respectfully submitted that under present circumstances it is the phone companies and not the federal courts that are making fundamental decisions as to what constitutes a "necessary" wiretap - and that is because there is no uniformity among or within the Circuits on this question.

The Ninth Circuit itself has ruled inconsistently on this matter. In Bubis v. United States, 384 F.2d 643 (9th Cir. 1967), it was held that:

> " ... the monitoring and tape recording ... after ample evidence has been secured of the illegal use by appellant of the company's facilities, was unreasonable and unnecessary. To sanction such practices on the part of the telephone company would tend to emasculate the protection of privacy §605 was intended to protect. In these circumstances the District Court erred in admitting into evidence the tape recordings...." (Emphasis added.)

But in United States v. Goldstein, 535 F.2d 1305 (9th Cir. 1976), the Court allowed wiretapping and said:

> "This case does not involve unreasonable monitoring, as found in Bubis v. United States, supra, where the phone company recorded every phone call made or received by the suspect for three months. Rather, only fraudulent calls were recorded, the recordings were limited to the initial portion of the calls, and the device was installed only long enough to allow the company to insure that it could sustain a successful prosecution. The investigation was reasonably justified and 'to an extent reasonably necessary for the company's investigation' and was, therefore, permissible. United States v. Bubis, 384 F.2d at 648."

It must be noted that in Bubis, the Ninth Circuit used as a standard the conduct of the phone company before the tap was placed. In Goldstein, the emphasis was placed on conduct during the wiretap. In the case at bar, petitioner argued before the Ninth Circuit that the wiretap was not "necessary" under the Bubis doctrine. But the Court dismissed his contention with an abrupt reference to the Goldstein decision - which was inapposite. This confusion is

typical of the many cases brought under these statutes, and the confusion will continue and intensify unless this Court acts to end it.

The Court of Appeals Erred in Holding That Evidence Otherwise Barred by 47 U.S.C. §605 Was Admissible Under 18 U.S.C. §2511

It is absolutely clear that had the tap been placed on petitioner's phone by law enforcement officials, a violation of petitioner's rights under the Fourth Amendment would have occurred. Katz v. United States, 389 U.S. 347. This Court has never ruled directly on the issue of use as evidence by the government of wiretap information obtained by a private wire carrier where such information could not be obtained directly by the government absent a warrant.

It is equally clear that prior to passage of the Omnibus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. §2511(2), the conduct of Pacific Telephone would have been absolutely barred, and the wiretap on petitioner's phone could not have been placed at all.

Even though 18 U.S.C. §2511 exempts wire carriers from the proscriptions imposed by 47 U.S.C. §605, it by no means follows necessarily that §2511 "authorizes"

phone companies to wiretap. Nor does §2511 appear on its face to allow the companies to disclose wiretap information to the government or allow the government to make use of such information as evidence in a criminal prosecution.

Section 605 is absolute in its language and has been so interpreted by this Court. Nadrone v. United States, 302 U.S. 379 (1937).

In Nadrone v. United States, 302 U.S. 379 (1937), the United States Supreme Court interpreted the application of §605 thusly:

> "Taken at face value the phrase 'no person' comprehends federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to empoloyes [sic] of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena." 302 U.S. at p. 379.

* * *

"We nevertheless face the fact that the plain words of Section 605

> forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person.' To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the Act forbids such testimony seems to us unshaken by the Government's arguments." 302 U.S. at p. 382. (Emphasis original.)

Accord: Benati v. United States, 355 U.S. 96 (1957).

Section 2511 has been treated as either an amendment or exception to §605. But to so treat §2511, it is necessary to read that section as an "authorizing" statute - and there is no self-evident reason to do so. Indeed, the Ninth Circuit has held that §2511 is " ... not ... a positive authorization of such taps." United States v. Keen, 508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975).

This discrepency was recognized, as was the advisability of Supreme Court review in this field, by Mr. Justice Fortas, in a dissenting opinion in Hanna v. United States, 394 U.S. 1015. Joined by Mr. Justice Douglas in his opinion that a writ of

certiorari should issue in order to define the relationships between §605, §2511, the Constitution, and the various Courts of Appeals opinions. Justice Fortas wrote:

> "I would grant certiorari in this case to resolve the area of conflict between circuits and to determine whether §605 permits the telephone company to intercept and divulge personal communications which are used in the expectation of freedom from 'the uninvited ear.' Katz v. United States, 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)."

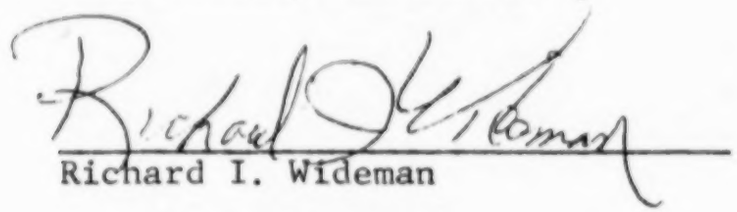
And, he added, in a footnote:

> "It is by no means clear that the new statute would authorize this kind of conduct if a similar case occurred today. Unless it did, §605 would still apply and the same problems that exist in this case would arise again."

CONCLUSION

WHEREFORE, for the reasons herein shown, this petition for writ of certiorari should be granted.

Respectfully submitted,



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November 30, 1977

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 76-3391
BERNARD CORNFELD, dba Grayhall, Inc., Defendant-Appellant.	)	OPINION

Appeal from the
United States District Court
for the
Central District of California.

Before: ELY and HUFSTEDLER, Circuit Judges, and LINDBERG,* District Judge.

PER CURIAM:

Appellant Bernard Cornfeld was

*The Honorable William J. Lindberg, Senior United States District Judge, Seattle, Washington, sitting by designation.

convicted by jury trial on three counts of fraud by wire, in violation of 18 U.S.C. § 1343, for the use of two multi-frequency signal generators, called "blue boxes", which enabled callers to re-route long distance telephone calls and avoid being billed for the services. We affirm.

I

The indictment chronologically broke down the scheme to defraud into two separate time periods. Between July 20 and October 18, 1974, Cornfeld utilized or caused to be utilized the "415" area code scheme, and between approximately October 29, 1974 and January 28, 1975, he utilized or caused to be utilized the "800" area code scheme. Count three pertained to a single telephone call on or about January 17, 1975, with respect to a call to Geneva, Switzerland.

In December, 1974, William Chaney, an experienced Pacific Telephone Company (Pacific) investigator, routinely reviewed an 800 INWATS print-out for the period between October 29 and November 7, 1974, and noted that twelve "800" number calls were made from telephone number 274-8698, registered to Grayhall, Inc., 1100 Carolyn Way, Beverly Hills, California (Grayhall). Seven of these calls were made to the Sheraton Hotel Reservation Service at 800-325-3535 and lasted a total of eighty-nine

minutes, an average of 12.7 minutes. Chaney's suspicions became aroused because the Sheraton reservation service number is one commonly employed by blue box users and the normal time period within which reservation services are executed is less than three minutes. A check of the application for telephone service showed that appellant Cornfeld was president of Grayhall.

Pursuant to Pacific's policy, Chaney requested from the accounting department of the company a "series 300" study on 274-8698. The series 300 study contained a print-out of every number that was dialed from 274-8698 to numbers outside the area code 213. Chaney found that twenty-seven calls were placed to various area code 800 numbers during the period between November 25 and December 21, 1974, with an average calling time of 12.7 minutes per call.

At the same time Chaney learned that the telephone number 274-8698 was one of three telephone numbers assigned in rotary to Grayhall; the other numbers were 274-8696 and 274-8697. Chaney additionally discovered that 274-4688 was assigned to Grayhall as a separate number. Following Pacific's standard procedure for documentation in potential "blue box" cases, Chaney attached a CMC 2600 device to 274-8698 on January 8, 1975. The CMC 2600 is a device which registers on a counter the

number of times a 2600 cycle tone, a tone emitted by blue boxes, is sent across the line. On the same day, Chaney connected a tape recorder to the CMC 2600. The tape recorder was activated automatically when the CMC 2600 registered a burst of 2600 cycle activity and would automatically terminate the recording after two minutes. Deciding to use a more sophisticated device, he replaced the CMC 2600 with a Hekemian 51A. This device not only performed the same functions as the former, but also produced a tape print-out in black lettering of all outgoing calls from the telephone, and shifted to an upper key and printed in red ink the numbers called via the blue box. The Hekemian 51A was attached from January 8 until January 28, 1975, a period of twenty days; the tape recorder was attached for only 13 days.

On January 17, 1975, the CMC 2600 was attached to telephone number 274-4688; on January 21, the two-minute tape recording device was attached. While the CMC 2600 was removed on January 28, 1975, eleven days later, the tape recorder was removed after only one day.

In the opinion of Chaney, the total number of area code 415 calls listed that were completed via the blue box was 319; the total number of area code 800 calls was 55. On January 22, 1975, Chaney informed the F.B.I. of his investigation.

On January 28, F.B.I. Special Agent Willie White participated in the execution of a search warrant at Grayhall. The agents recovered two blue boxes, a group of cards containing numbers frequently called via the blue box, and directions for using a blue box, all in a third floor, locked bedroom.

On the basis of the material produced by Pacific and the evidence obtained in the search of Grayhall, Cornfeld was charged with three counts of fraud by wire and causing an offense, under 18 U.S.C. §§ 1343 and 2. Cornfeld moved under Rule 41(f), Fed.R.Crim.Proc., to suppress all of the evidence resulting from the telephone company's investigation and from the F.B.I. search. Following a hearing, the motion to suppress was denied. The matter was tried to a jury on August 3, 1976, resulting in findings of guilty on all counts on August 10, 1976.

II

The numerous issues raised on appeal may be summarized as follows:

(1) whether Pacific Telephone Company conducted its investigation in a constitutionally and statutorily proper manner under federal law;

(2) whether the Communications Act of 1934 and Title III of the Omnibus Crime

Control Act authorized the monitoring of telephone calls in the manner done by Pacific Telephone in this case;

(3) whether the evidence should have been excluded because it was obtained in violation of state law;

(4) whether the prosecution's conduct during trial was improper and resulted in substantial prejudice;

(5) whether the prosecution's summation impermissibly commented on Cornfeld's failure to testify;

(6) whether the questioning of prosecution and defense witnesses by the trial judge was improper; and

(7) whether the evidence adduced at trial was sufficient to prove guilt beyond a reasonable doubt.

III

The appellant's primary argument, raised by the first three issues, asks this court to address again the propriety of the investigative conduct of a private telephone company, in light of the Communications Act of 1934, 47 U.S.C. §605, and Title III of the Omnibus Crime Control Act, 18 U.S.C. §2511(2)(a)(i).[1] Cornfeld alleges that the attachment of the CMC

2600 device, the monitoring of the telephone lines by the tape recorder, and the subsequent disclosure to the F.B.I. of the information secured through these devices were made in violation of federal and state law.

The same issues were presented in United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976), cert. denied, ____U.S. ____(1977); see also United States v. Auler, 539 F.2d 642 (7th Cir. 1976), cert. denied, ____U.S.____ (1977). Appellant argues that Pacific's monitoring violated the exceptions previously carved out of § 605, in that it was not reasonable or necessary to tape record or attach additional monitoring devices to the telephones after Chaney first determined in his mind that a blue box was in fact being used. According to Chaney's testimony, this occurred after he had reviewed the 800 INWATS print-out and the series 300 study, and before any devices were actually attached to the telephones. In Goldstein, supra, we re-affirmed our earlier decision in Bubis v. United States, 384 F.2d 643 (9th Cir. 1967), that in the enactment of § 605, Congress did not intend to deprive communications systems of their fundamental right to take reasonable measures to protect themselves and their properties against the illegal acts of a trespasser. Under § 605, it became well established that a telephone company could monitor

and disclose telecommunications on its line to the extent "reasonably necessary" to protect its property from fraud. United States v. Goldstein, supra at 1309 and n. 2. But the authority to intercept and disclose wire communications is not unlimited, we noted. The telephone company may only intercept a communication which is a "necessary incident to the rendition of . . . service or . . . [for] the protection of the [company's] rights or property . . .", 18 U.S.C. § 2511(2)(a)(i). While in Bubis, supra at 648, the court reversed a conviction where it was shown that the telephone company had resorted to "unreasonable practices", this court did note that "reasonable methods" included the use of a frequency recording device and limited use of a tape recorder to identify the offending parties. Subsequently, in United States v. Goldstein, supra, we extended this authority to include the authorized release to federal authorities such as the F.B.I., the information gathered.

The appellant has failed to demonstrate how the factual situation present in this case is distinguishable from that found in Goldstein, such that a different result is required. The question of the violation of state law was decided adversely to appellant in Goldstein, and requires no further elaboration.

IV

Appellant next alleges that improper prosecutorial conduct was intended to mislead the jury and resulted in substantial injustice. In this regard, appellant cites various statements made by the prosecutor during his opening argument regarding the forthcoming testimony of several witnesses, various alleged admonitions by the court to the prosecutor concerning the type of questions he was asking, and an alleged innuendo that Cornfeld and a witness were "sleeping together". A review of the transcript fails to indicate that the prosecutor strayed beyond the permissible bounds, either in the opening or closing arguments. Furthermore, the appellant's failure to object at trial requires that he demonstrate plain error in order to win reversal of the conviction on appeal, United States v. Memoli, 449 F.2d 160 (9th Cir. 1971), cert. denied, 405 U.S. 928 (1972); Rule 52(b), Fed.R.Crim.Proc., and no such error has been shown. As to the "sleeping together" remark, when read in its full context, it is clear that the remark dealt only with the inquiry as to whether or not the witness and Cornfeld were together at all times and addressed the question of the credibility of the witness in testifying that Cornfeld had no opportunity to use a blue box. The question was an appropriate area of inquiry and only in the most convoluted of

of readings could it be construed to imply what appellant would have us believe it implied.

V

The appellant next argues that the prosecutor commented on Cornfeld's failure to testify. During his closing argument, the prosecutor stated that "in a fraud-type case such as this, the individual, the defendant, who has perpetrated the fraud is the one who wants to keep it a secret. . . . In this particular case you have a clever individual who used people to insulate himself from criminal responsibility . . . in a very clever way, by keeping quiet about the blue boxes." Later he stated to the jury that "it is totally illogical, that the defendant could present this story . . . ." Read in their full context, the remarks do not indicate a reference to Cornfeld's failure to testify, but rather refer to the assertion that one who engages in criminal activity is not going to make it public knowledge. It is entirely appropriate for the prosecutor to argue to the jury and attempt to explain away the reason for Cornfeld's secrecy in the operation of the blue boxes. The comments were not of such a character that the jury would naturally and necessarily take them to be comments on the failure of the accused to testify, Griffin v. California, 380 U.S. 609 (1965).

Furthermore, no objection was made at the time of the comments and they cannot be construed as plain error, United States v. Parker, 549 F.2d 1217 (9th Cir. 1977), cert. denied, 97 S.Ct. 1659 (1977); Rule 52(b), Fed.R.Crim.Proc.

VI

Appellant next argues that the trial judge improperly questioned prosecution and defense witnesses to the extent that actual prejudice inhered to Cornfeld. The allegation is without merit. The trial judge may question witnesses to clear up ambiguities and clarify the issues for the jury, so long as he maintains an appearance of impartiality, Rule 614, Fed.R.Civ.Proc.

VII

Finally, the appellant argues that the evidence adduced at trial was insufficient to prove guilt beyond a reasonable doubt. The proper standard for determining the sufficiency of the evidence on appeal is "whether the trier of fact could reasonably arrive at its conclusion," Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Rojas, 458 F.2d 1355, 1356 (9th Cir. 1972). The record indicates that Cornfeld was an incorporator of Grayhall; was listed as president on all telephone bills; used the residence as his principal residence from May, 1974

through January, 1975; was in control of the secretaries; and instructed his secretaries to place overseas calls for himself and his guests. Borland's testimony about her conversation with Cornfeld in mid-October, 1974 indicated that she discussed blue boxes with him and was told to prepare an "800" number list; Cornfeld kept after her to prepare the list. Carson's testimony indicated that there was a blue box at the residence at least as early as late 1971 and that she gave Cornfeld a clear warning about the danger of using the devices.

Read as a whole, there is more than ample evidence from which the trier of fact could determine that Cornfeld used or caused to be used blue boxes in the placing of long distance telephone calls.

Affirmed.

Footnote 1/ (Reference page 6a)

47 U.S.C. § 605 prohibits unauthorized publication or use of wire or radio communication:

> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

18 U.S.C. § 2511(2)(a)(i) provides that:

> It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

APPENDIX B

NOTE: Although the "Filing Date" which appears on Page One of the Court of Appeals' Opinion within the stamp of the Clerk of the Court is October 27, 1977, the date on which the Judgment was docketed was October 31, 1977. Under Rule 36 of the Federal Rules of Appellate Procedure: "The notation of Judgment in the docket constitutes entry of the Judgment." See also Scofield v. Labor Board, 394 U.S. 423, 427.